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United Steelworkers of America v. Weber: Title VII Revised

Charles W. Schlasser Jr.

UNITED STEELWORKERS OF AMERICA V. WEBER: TITLE VII REVISED

INTRODUCTION

In 1974 the United Steelworkers of America and the Kaiser Aluminum and Chemical Corporation entered into a master collective bargaining agreement covering terms and conditions of employment at fifteen Kaiser plants. This agreement included an affirmative action program designed to increase minority representation in skilled craft jobs in Kaiser's factories. The plan provided for the establishment of a new in-house apprenticeship program. For every nonminority applicant accepted into the program not less than one minority applicant was to enter until the ratio of minority to nonminority craftsmen equalled the corresponding ratio in the local labor force.[1]

In the agreement's first year of operation at the Gramercy, Louisiana plant, thirteen craft trainees were selected from the hourly work force. Of these, seven were black. Within each racial classification the most senior employee applying was selected; however, some of the successful black applicants had less seniority than their white co-workers who would have been selected but for the one black-one white requirement. Brian Weber was in the latter class, and when his application was denied he filed suit against Kaiser and the union, charging that the program discriminated against him and other members of his class in violation of title VII of the Civil Rights Act of 1964.[2] The district court agreed with this contention and enjoined the defendants from denying Weber and his class access to on-the-job training on the basis of race.[3] On appeal, the Fifth Circuit affirmed with one dissent.[4] The Supreme Court reversed,[5] holding that title VII did not prohibit private parties from voluntarily adopting affirmative action programs to eliminate conspicuous racial imbalances in job categories that were traditionally segregated.[6]

I. THE FACTUAL SETTING

Prior to 1974, only 1.8%[7] of skilled craft workers and only 14.8%[8] of all employees at Kaiser's Gramercy plant were black. This was in stark contrast to the racial composition of the surrounding area in which 39% of the work force was black.[9] Although Kaiser had apparently been recruiting black

1. 1974 Labor Agreement, pertinent parts *reprinted in* Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. 761, 763 (E.D. La. 1976).
2. 42 U.S.C. § 2000e (1976).
3. Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. 761.
4. Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216 (5th Cir. 1977).
5. United Steelworkers of America v. Weber, 99 S. Ct. 2721 (1979).
6. *Id.* at 2730.
7. *Id.* at 2725.
8. 415 F. Supp. at 764.
9. 99 S. Ct. at 2725.

craftsmen,[10] the company had a five-year prior experience requirement which, because of historical discrimination by craft unions, few blacks were able to meet.[11] Consequently, Kaiser and the union were under a great deal of pressure to adopt an affirmative action program to increase minority representation in skilled craft positions. First, there was the constant threat of title VII litigation by minorities. A Kaiser plant in nearby Chalmette, Louisiana, had recently been sued under title VII due, in part, to the small percentage of black craftsmen.[12] Second, the Office of Federal Contracts Compliance (hereinafter referred to as the OFCC), which was responsible for the administration of the President's anti-discrimination program,[13] was encouraging Kaiser to increase its minority representation. In 1971, the OFCC had found violations of its regulations in a compliance review of Kaiser's operations.[14] These infractions, if not corrected, could have resulted in a number of sanctions against Kaiser including cancellation of its government contracts.[15] Therefore, Kaiser dropped its five-year experience requirement and, together with the union, established an apprenticeship program based on OFCC suggestions. The plan was patterned after the consent decree entered for the steel industry in the massive case of *United States v. Allegheny-Ludlum Industries, Inc.*[16] No sooner had this occurred, however, than the program was struck down by the courts as violating the civil rights of Kaiser's white employees.

II. THE LEGAL SETTING

The particular provisions of the Civil Rights Act of 1964 that Kaiser's program was said to violate are sections 703(a), 703(d), and 703(j). Section

10. 415 F. Supp. at 764. *But see* Petition for Certiorari of United States and EEOC at 18.

11. 99 S. Ct. at 2725.

12. Parson v. Kaiser Aluminum & Chem. Corp., 575 F.2d 1374 (1978), *cert. denied*, 99 S. Ct. 2417 (1979). The court held, *inter alia*, that evidence showing less than three percent of Kaiser's craftsmen were black, when compared to the percentage of black hourly employees, was entitled to substantial, if not dispositive, weight in assessing whether plaintiff had established a prima facie case of discrimination. 575 F.2d at 1389.

13. The OFCC acts under the Secretary of Labor who is charged with the administration of Executive Order No. 11,246. That order, one of a series in effect since 1941, requires federal contractors to take affirmative action to insure that applicants for jobs are treated without regard to their race. Exec. Order No. 11,246, 3 C.F.R. 339 (1964-65 Compilation), *reprinted in* 42 U.S.C. § 2000e app., at 1232-36 (1976).

14. The OFCC found that Kaiser had waived prior experience requirements for white craftsmen but not for blacks. Kaiser also had apparently failed to recruit black craftsmen. Petition for Certiorari of United States and EEOC at 18.

15. Other possible sanctions include enforcement or criminal proceedings by the Department of Justice and debarment from further government contracts. Exec. Order No. 11,246, 3 C.F.R. 339, 343-44 (1964-65 Compilation), *reprinted in* 42 U.S.C. § 2000e app., at 1234-35 (1976).

16. 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). This was a suit brought on behalf of the Secretary of Labor and the Equal Employment Opportunity Commission against nine major steel companies and the United Steel Workers of America. The proceeding involved over 240 plants employing more than 300,000 people and alleged widespread practices of discrimination in hiring and job assignments. The suit culminated in two lengthy consent decrees providing *inter alia* for: (1) immediate reform of seniority systems to remove the continuing effects of past discrimination; (2) establishment of goals and timetables for fuller utilization of females and minorities; and (3) establishment of a $30,000,000 back pay fund to be paid to the victims of the unlawful practices alleged in the complaint.

703(a) makes it unlawful for an employer to discriminate against any individual on the basis of race with respect to terms or privileges of his employment or to classify employees in a way which would tend to deprive them of opportunities because of their race.[17] Section 703(d) makes it unlawful to discriminate against employees in admission to apprenticeship programs on the basis of race.[18] Section 703(j) states that nothing in title VII shall be interpreted to require an employer to grant preferential treatment to any group merely on account of a racial imbalance in the work force.[19]

Until the *Weber* case, the Supreme Court appeared to be of the opinion that these provisions were intended to promote the use of individual merit rather than race as the criterion for hiring and promotion in employment.[20] In *Griggs v. Duke Power Co.* the Court had declared that, far from disparaging job qualifications, Congress, by enacting title VII, made such qualifications the controlling factor so that race became irrelevant.[21] Just as discrimination was made illegal, so too was preferential treatment for any race.[22] "Discriminatory preference for any group, minority or majority, [was] precisely and only what Congress [had] proscribed."[23]

Despite these developments, there had come to be a well-recognized exception to the rule against racial preferences. Preferential hiring and promotion have often been ordered by courts as an equitable remedy for an

17. 42 U.S.C. § 2000e-2(a) (1976) specifically provides:

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

18. 42 U.S.C. § 2000e-2(d) (1976) specifically provides:

> It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

19. 42 U.S.C. § 2000e-2(j) (1976), entitled "Preferential treatment not to be granted on account of existing number or percentage imbalance," specifically provides:

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

20. In Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978), a sex discrimination case, the Court characterized title VII as "a statute that was designed to make race irrelevant in the employment market . . . ." *Id.* at 709.

21. 401 U.S. 424, 436 (1971).

22. Chance v. Board of Examiners, 534 F.2d 993, 998 (2d Cir. 1976).

23. Griggs v. Duke Power Co., 401 U.S. at 431.

employer's past discrimination.[24] Indeed, title VII itself appears to contemplate such relief where appropriate to remedy past discrimination.[25] The rationale for the preference is that it is merely the consequence of a court's equitable power to make an injured party whole. The fact that the remedy is fashioned along racial lines merely reflects that the injury was inflicted in racial terms.[26]

Even as a remedy for past discrimination the validity of preferential treatment has been questioned,[27] and in *Regents of the University of California v. Bakke*,[28] Justice Powell reaffirmed the importance of limiting preferential treatment to remedial situations. He pointed out that the Court had never approved a racial classification aiding minorities at the expense of other innocent individuals in the absence of some official finding of discrimination.[29]

The difficulty with this limitation was that the Court had also recognized that statistics showing a racial imbalance could be used by title VII plaintiffs to establish a prima facie case of race discrimination.[30] These rules created a dilemma for employers. On the one hand, they were faced with the threat of title VII litigation by minorities if there was a racial imbalance in the work force. On the other hand, employers who sought to correct the imbalance by granting preferential treatment to the underrepresented class were in danger of title VII liability to whites for "reverse discrimination."[31] Indeed, in *McDonald v. Santa Fe Trail Transportation Co.*,[32] the Court had held that title VII protected whites just as much as blacks from employment discrimination.[33] The only way for employers to avoid this dilemma would be to admit past discrimination against the group sought to be preferred. The racial preference could then be defended on the grounds that it was remedial in nature and hence within the exception to title VII. But this would be, at best, a Pyrrhic victory for the employers because they would be admitting liability to the victims of their discrimination, which could include responsibility for back pay.[34]

Faced with these alternatives, most employers could be expected to do

24. *See, e.g.*, EEOC v. American Tel. & Tel. Co., 556 F.2d 167 (3d Cir. 1977). In Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), the Court recognized the appropriateness of such affirmative relief under certain circumstances. *Id.* at 774.

25. 42 U.S.C. § 2000e-5(g) (1976) specifically provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

26. Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d at 224-25.

27. Franks v. Bowman Transp. Co., 424 U.S. at 781 *passim* (Powell, J., dissenting).

28. 438 U.S. 265 (1978).

29. *Id.* at 307.

30. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1973).

31. *See, e.g.*, EEOC Decision 75-268, 10 Fair Empl. Prac. Cas. 1502 (1975).

32. 427 U.S. 273 (1976).

33. *Id.* at 280. Note, however, that the Court specifically declined to rule upon the application of this principle to affirmative action programs. *Id.* at 280 n.8.

34. Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d at 231 (Wisdom, J., dissenting).

nothing to correct conspicuous racial imbalances in their work force. Kaiser's treatment in the lower courts in the *Weber* case indicated the fate an adventurous employer could expect for adopting an effective affirmative action program that was not a response to the employer's past discrimination. This situation seemed at odds with the policy of the Civil Rights Act favoring voluntary cessation of discrimination and informal resolution of racial problems in employment. The reconciliation of these conflicting rules and policies was the task to which the Supreme Court addressed itself in *Weber*.

III. THE DECISION

The majority, speaking through Justice Brennan, emphasized at the outset that Congress' primary purpose in enacting title VII was to create employment opportunities for blacks in areas from which they had traditionally been excluded.[35] To read the statute as prohibiting the kind of affirmative action taken by Kaiser and the union would frustrate that purpose and the policy favoring voluntary compliance. Thus, the Court relied heavily on the fact that section 703(j) only stated that preferential treatment cannot be *required*. The statute does not say that preferential treatment is *prohibited*.[36] This omission was said to mean that Congress intended to leave employers free to adopt plans to achieve a racially balanced work force. This conclusion was bolstered by evidence that section 703(j) was added to the bill to allay the fears of many legislators in 1964 that title VII would increase governmental intrusion into the private affairs of companies and unions.[37] To read section 703(j) as a federal prohibition against private racial balancing would be to introduce just the element of governmental interference with the private sector that the section was designed to prevent. Finally, the majority emphasized the reasonableness of the plan, noting that the program was temporary and created no absolute bar to the advancement of white employees.[38]

In a bitter dissent, Justice Rehnquist accused the majority of not only ignoring the plain language of title VII and the legislative history behind it but also of deviating from what had been, up until now, the unswerving interpretation of the statute by the Court.[39] Chief Justice Burger agreed, accusing the majority of amending title VII to achieve what it regarded as a desirable result.[40]

Justice Blackmun questioned the soundness of the majority's reading of the statute, but concurred on the theory that there ought to be an exception to title VII allowing employers who have committed "arguable violations" of the statute to take responsive action without liability to whites.[41] Justices Stevens and Powell took no part in the decision.

35. 99 S. Ct. at 2727.
36. *Id.* at 2729.
37. *Id.*
38. *Id.* at 2730.
39. *Id.* at 2736-37.
40. *Id.* at 2734-35.
41. *Id.* at 2731. This is the theory Judge Wisdom relied on in his forceful dissent from the opinion of the majority of the court of appeals. *See* 563 F.2d at 227.

IV. ANALYSIS OF THE MAJORITY'S OPINION

A. *The Legislative Intent*

The plain language of sections 703(a) and (d)[42] seems to indicate that the racial balancing system adopted by Kaiser and the union discriminated against Brian Weber because of his race. Not only were certain applicants selected for the craft training program over the more senior Weber because they were black, but at least one position was open to blacks only; Weber, being white, could not even apply.[43] The program classified Weber in a way that tended to deprive him of employment opportunities because of his race in violation of section 703(a)(2) and thus discriminated against him in violation of sections 703(a)(1) and (d). Normally, given such clear language, the rules of statutory construction would not permit the Court to consider extrinsic matter such as evidence of the legislative intent.[44] It could be argued, however, that title VII is nevertheless ambiguous, thus justifying an inquiry into the legislative history.

The Civil Rights Act seems to have been adopted for the purpose of eliminating traditional race discrimination, *i.e.*, the kind that is caused by actual or subconscious hostility toward the group discriminated against.[45] Thus, it could be asserted that the Act is ambiguous in its application to possible race discrimination not founded on distaste for a white "victim" but caused by a benign attempt to eliminate the vestiges of society's discrimination against blacks.[46] Even if this contention is accepted, a resort to the legislative history of the Civil Rights Act does not seem to uncover any support for the majority's conclusion that the Act permits private racial balancing. Justice Rehnquist's dissent effectively catalogues the numerous occasions during the congressional debates when it was unequivocally declared that title VII would prohibit employers from discriminating against *or in favor* of an employee because of his race.[47] Any deliberate attempt to

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42. *See* notes 17 & 18 *supra*.

43. Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. at 764.

44. Caminetti v. United States, 242 U.S. 470, 485, 490 (1917).

45. The Act "provides the means of terminating the most serious types of discrimination." H.R. REP. NO. 914, 88th Cong. 1st Sess. 8, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2391, 2393. Citing remarks made by various senators and congressmen during the debates, the union pointed out that title VII was aimed at "acts of 'ugliness', 'intolerance', 'bigotry', 'bias', 'prejudice', and 'racial preference'." Brief for Petitioner United Steel Workers of America at 20.

46. Even this argument is subject to doubt. Senator Humphrey defined discrimination very broadly as different "treatment given to different individuals because of their different race . . . ." 110 CONG. REC. 5423 (1964).

47. 99 S. Ct. at 2741-51. "The bill would do no more than prevent . . . employers from discriminating against or in favor of workers because of their race, religion, or national origin." 110 CONG. REC. 1518 (1964) (remarks of Rep. Cellar). "Employers and labor organizations could not discriminate in favor of or against a person because of his race, his religion or his national origin. In such matters . . . the bill now before us . . . is colorblind." *Id.* at 6564 (remarks of Sen. Kuchel).

> [I]f a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a non-discriminatory basis. He would not be obliged—or indeed permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.

Id. at 7213 (mem. of Sens. Clark & Case).

maintain a racial balance would, it was stated, be a violation of title VII because it would mean that employment decisions were being made on the basis of race.[48] This the Act strictly prohibited.[49]

In support of its conclusion, the majority relied in part on language in the House of Representatives' report accompanying the Civil Rights Act.[50] The report states that, in addition to dealing with the most glaring discrimination, the Civil Rights Act would "create an atmosphere conducive to voluntary resolution of other forms of discrimination."[51] This suggested that Congress did not intend to prohibit private voluntary affirmative action programs. Even if it is assumed, however, that one of those "other forms of discrimination" was a numerical underrepresentation of minorities in skilled jobs,[52] the issue of the validity of the means chosen to overcome the discrimination still remains. Merely because an affirmative action program is volun-

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> It [the title] does not provide that any quota systems may be established to maintain racial balance in employment. In fact, the title would prohibit preferential treatment for any particular group, and any person, whether or not a member of any minority group, would be permitted to file a complaint of discriminatory employment practices.

Id. at 11,848 (remarks of Sen. Humphrey).

48. 110 CONG. REC. 7213 (1964) (mem. of Sens. Clark & Case). *See also* the memorandum from the Department of Justice, introduced by Senator Clark, which stated:

> There is no provision . . . in title VII . . . that requires or authorizes any Federal agency or Federal court to require preferential treatment for any individual or any group for the purpose of achieving racial balance . . . . No employer is required to maintain any ratio of Negroes to whites . . . . On the contrary, any deliberate attempt to maintain a given balance would almost certainly run afoul of title VII because it would involve a failure or refusal to hire some individual because of his race . . . . What title VII seeks to accomplish, what the civil rights bill seeks to accomplish, is equal treatment for all.

Id. at 7207.

49. *Id.* at 1518 (remarks of Rep. Cellar); *id.* at 6465 (remarks of Sen. Kuchel); *id.* at 8921 (remarks of Sen. Williams); *id.* at 11,848 (remarks of Sen. Humphrey).

In his dissent in *Franks v. Bowman Transp. Co.*, Justice Powell speaks of "the kind of preferential treatment *forbidden* by § 703(j) . . ." (emphasis added) and describes that provision as a "bar" to preferential treatment. 424 U.S. at 792-93. In Chance v. Board of Examiners, 534 F.2d at 998, the Court of Appeals for the Second Circuit stated that "[a]ll agree, as do we, that the non-remedial distortion of a seniority system through preferential treatment based solely upon race is a form of reverse discrimination *specifically proscribed* by Congress." 534 F.2d at 998 (emphasis added). "[C]reating fictional employment time for newly-hired Negroes would comprise preferential rather than remedial treatment. The clear thrust of the Senate debate is directed against such preferential treatment on the basis of race." Local 198, United Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970), *cited with approval in* Jersey Cent. Power & Light Co. v. Local 327, IBEW, 508 F.2d 687, 709 (3d Cir. 1975), *cert. denied, sub nom.* Jersey Cent. Power & Light Co. v. EEOC, 425 U.S. 998 (1976). In Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976), the court upheld against a title VII attack a seniority system that had a last hired-first fired feature. The court stated that "[t]o hold otherwise would be tantamount to shackling white employees with a burden of past discrimination created not by them but by their employer. Title VII was not designed to nurture such reverse discriminatory preferences." 502 F.2d at 1320.

The commentators on the Act were largely in accord that nonremedial preferences were illegal. *See, e.g., Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1114-15 (1971). *See also* Note, *The Employer's Dilemma: Quotas, Reverse Discrimination, and Voluntary Compliance*, 8 LOY. CHI. L.J. 369, 373 (1977) in which the author states: "[T]he legislative history strongly suggests that the section [703(j)] was intended to *expressly prohibit* the use of preferential practices by employers."

50. 99 S. Ct. at 2728.

51. H.R. REP. NO. 914, 88th Cong., 1st Sess. 18, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2355, 2393.

52. Section 703(j) of the Act which is entitled "Preferential treatment not to be granted on

tary does not mean that it is consistent with title VII. Any affirmative action program must be reconciled with the Act's mandate that each *individual's* right to be free from discrimination be respected.[53]

The other argument advanced by the majority was that section 703(j) states only that employers may not be *required* to engage in racial balancing. It does not say that they are not *permitted* to do so.[54] The Court pointed out that opponents of title VII expressed two fears during the congressional debates.[55] First, they charged that the word "discrimination" would be interpreted by the federal government to include the existence of a racial imbalance in a factory. The government would then require the employer to racially balance his work force. Second, the legislators argued that even if not required to do so, employers would voluntarily prefer minorities in order to correct racial imbalances. Since, the argument went, section 703(j) only speaks to the first objection, it must be concluded that Congress did not intend to prohibit employers from voluntarily giving minorities preferential treatment.[56]

The fallacy of this argument, however, is that there does not seem to be any evidence to support the inference that the words "or permitted" were left out because of some deliberate decision by Congress to leave employers free to prefer minorities. The Court arrived at its conclusion by means of a subtle distortion of the meaning of the legislative history of the statute. The remarks of Senator Sparkman to which the majority referred[57] did not express the concern that employers would voluntarily engage in racial balancing even if not required. No one had ever suggested that title VII would permit this. In light of the clear language of sections 703(a) and (d) such a contention would have been considered somewhat frivolous.[58] Senator Sparkman was concerned that even though the bill did not expressly require quotas, the agents charged with the administration of title VII would put pressure on employers with unbalanced work forces to adopt preferential programs.[59] Although proponents of the Act assured the Senator that such

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account of existing number or percentage imbalance" strongly suggests that Congress did not want mere racial imbalances to be illegal. *See* note 19 *supra*.

53. In Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978), the Court stated that "[i]t is clear beyond cavil that the obligation imposed by title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." *Id.* at 579. In Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978), the Court noted that "[t]he statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial . . . class." *Id.* at 708. The basic policy of the Act "requires that we focus on fairness to individuals rather than fairness to classes." *Id.* at 709.

54. 99 S. Ct. at 2728-29.

55. *Id.* at 2729.

56. *Id.*

57. *Id.*

58. Justice Rehnquist forcefully pointed this out in his dissent. *See* 99 S. Ct. at 2748-49.

59. *See* 110 CONG. REC. 8618-19 (1964). Senator Sparkman showed impressive foresight in predicting the practical administration of title VII over the years. He charged that the EEOC would use any underrepresentation of minorities as evidence of discrimination and would pressure the employer into adopting some type of quota system. He noted that "[s]uch a tendency has already been observed under the President's voluntary employment opportunities program. Employers have been threatened with the loss of their Government contracts if they did not comply." *Id.* at 8618. Senator Keating's response to this charge is very interesting. He said:

a result would be impossible,[60] the concern over the possible imposition of quotas was so pervasive that section 703(j) was added to make the prohibition explicit.[61] Hence, section 703(j) does not deal with the issue of voluntary preferences and does not seem to be authority for the proposition that they are permissible.

B. *The Federal Interference Argument*

The Court found additional support for its conclusion that title VII left employers and unions free to engage in racial balancing in the fact that title VII was designed to prevent undue governmental intrusion into the private affairs of business.[62] A holding that it prohibited race-conscious conduct would increase the role of the federal government and interfere with management prerogatives. There is no question that this was an important concern of many of the members of the Eighty-eighth Congress,[63] but the Court's use of this argument is rather ironic because its ruling seems to authorize just the kind of federal intrusion the Congress feared.[64] By characterizing Kaiser's affirmative action program as "voluntary" the Court shut its eyes to the fact that the OFCC has for some time compelled employers to practice racial balancing or risk the loss of their federal contracts.[65] The influence of the OFCC on Kaiser's decision to adopt the program was substantial.[66] The governmental intrusion that would result from a statutory prohibition against racial balancing seems less significant than the constant federal surveillance and pressure validated sub silencio in this case.

V. *WEBER* AND THE CONSTITUTION

It is not surprising that the Supreme Court chose to assume, somewhat artificially, that the Kaiser training program was voluntarily adopted. For one thing, the parties argued the case largely under this theory. Furthermore, a finding that agents of the federal government were requiring or even

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"Of course, improper administration of the law is a question that may be encountered at any time. I was speaking about the provisions of the bill." *Id.*

60. Those opposed to H.R. 7152 should realize that to hire a Negro solely because he is a Negro is racial discrimination, just as much as a 'white only' employment policy. Both forms of discrimination are prohibited by Title VII of this bill. The language of that title simply states that race is not a qualification for employment.

110 CONG. REC. 8921 (1964) (remarks of Sen. Williams).

61. Senator Smathers, expressing the fear that employers would protect themselves "by hiring a certain number of colored people in order to keep the might and majesty of the federal law and its large bureaucracy off his neck," was asked by Senator Humphrey if he would be content with the addition of a provision "that there should be no quota system." The Senator answered that in his opinion the "bill would be improved." *Id.* at 7800.

62. 99 S. Ct. at 2729.

63. "[M]anagement prerogatives . . . and union freedoms are to be left undisturbed to the greatest extent possible . . . . Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices." H.R. REP. NO. 914, 88th Cong., 1st Sess., pt. 2, at 29, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2391, 2516.

64. *See* 99 S. Ct. at 2749.

65. *See* OFCC Rev. Order No. 4, 41 C.F.R. § 60-2 (1978). *See also* 99 S. Ct. at 2737 n.2.

66. The district court judge in *Weber* emphasized that satisfying OFCC requirements and avoiding suits by minorities were Kaiser's "prime motivations" for adopting an affirmative action program. 415 F. Supp. at 765.

encouraging the private use of racial quotas would have raised the specter of the Constitution.[67] For the OFCC to sustain its program against the charge that it violated the due process clause of the fifth amendment,[68] the agency would have to show the program was necessary to satisfy a permissible federal interest.[69] The *Bakke* case,[70] with its apparent rejection of rigid racial selection criteria as a necessary means of achieving state interests would appear to pose a major obstacle to the justification of the OFCC's conduct. A private, voluntary program free of constitutional limitations would be much easier to uphold.[71]

VI. THE CONFLICT BETWEEN TITLE VII AND THE EXECUTIVE ORDER PROGRAM

The *Weber* case is the latest development in the continuing dispute over the possible conflict between title VII and the executive order program being administered by the Secretary of Labor.[72] The conflict has been dealt with a number of times by the courts[73] and at least once by the Congress.[74] The

67. State action for equal protection purposes may be predicated upon the conduct of regulatory agencies. It is not limited to acts of the legislature. Robinson v. Florida, 378 U.S. 153 (1964). The informal pressure exerted by the OFCC on Kaiser could conceivably be state action under the "encouragement" theory outlined in cases such as Reitman v. Mulkey, 387 U.S. 379 (1967).

68. In Bolling v. Sharpe, 347 U.S. 497 (1954), the Supreme Court noted that the fifth amendment does not contain an equal protection clause as does the fourteenth amendment, which applies only to the states. But the Court pointed out that the two concepts are not mutually exclusive and the discrimination may be so unjustifiable that it violates due process. *Id.* at 497.

69. Loving v. Virginia, 388 U.S. 1, 11 (1967). *Loving* pointed out that racial distinctions drawn by governments are subject to the most rigid scrutiny and require justification which is far more extensive than the "rational basis" test applied in cases where race is not the basis for the legal distinction. *Id.* at 8-11.

70. 438 U.S. 265 (1978).

71. It should also be noted that the Court has often stated that it will avoid ruling on constitutional questions when there are statutory or other solutions to the problem. *See, e.g.*, Rescue Army v. Municipal Ct., 331 U.S. 549 (1947).

72. *Compare* 49 Comp. Gen. 59 (1969) *with* 42 Op. Att'y Gen. 405 (1969). For a good discussion of the nature of the conflict, see Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723 (1972).

73. *See, e.g.*, Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972); Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971); Joyce v. McCrane, 320 F. Supp. 1284 (D.N.J. 1970).

74. In 1971, Congressman Dent and Senator Ervin spearheaded attacks on the power of the OFCC to demand racial balancing by employers even though such conduct might not be permissible under title VII itself. Proposed amendments to pending legislation and to the Civil Rights Act itself which would have put an end to the OFCC's activities were defeated in both houses. It has been argued that these events mean that the President's executive order program is no longer susceptible to challenges based on the separation of powers. *See*, Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723, 757 (1972). Even if the refusal to pass legislation halting the OFCC's affirmative action program can be taken for a sign that a majority of the members of both houses really approved of nonremedial government sponsored racial balancing, such approval does not resolve the conflict between title VII and the executive order program. The views of a later Congress are entitled to little weight in construing the Civil Rights Act of 1964. The intent of the Congress that enacted the statute controls. International Bhd. of Teamsters v. United States, 431 U.S. 324, 354 n.39 (1977). A true resolution of the conflict would probably require an amendment to the statute specifically providing for government-imposed racial balancing. *See Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1304 (1971).

possibility of conflict arises, among other things, because the OFCC regulations appear to require employers to engage in racial balancing in violation of section 703(j) and the general anti-discrimination provisions of title VII. There is no requirement in the OFCC regulations that any racial preference be a remedy for an employer's past discrimination.[75] A mere underutilization of minorities is enough to require an employer to develop "goals" and "timetables" and make efforts to meet them.[76]

Given the outcome of the *Weber* case, there was little chance that the Court would give any overt recognition to this possible conflict. To do so would then have required that the President's executive order program be sustainable in spite of its incompatibility with the will of Congress. In light of the historic decision in *Youngstown Sheet Metal & Tube v. Sawyer*,[77] all the parties seemed to agree that in a contest of strength, the President's program would perish in the face of the primary right of Congress to legislate in this area.[78] Hence, the majority was obliged to find room in title VII itself for Kaiser's affirmative action program, and any conflict between the OFCC program and title VII was quietly resolved in favor of the former.

CONCLUSION

The *Weber* case has established the validity of reasonable affirmative action programs designed to overcome racial imbalances in our factories. The Supreme Court is to be commended for providing a relatively clear answer to this question, in contrast to the confusing decision in *Bakke*; but one may question whether the price of clarity was too great in this case. The majority's interpretation of title VII is subject to doubt, and it is difficult to reconcile the opinion with the previous decisions of the Court in this area. The Court also seems to have ducked the issue of whether private employers can, consistently with title VII and the Constitution, be pressured by the federal government into racial balancing. Finally, the result seems inconsistent with the traditional notion of judicial restraint. Justice Burger may have been accurate in his characterization of the decision as a judicial amendment of title VII.[79] If this is so, then the decision to allow the use of strict racial classifications in the work place should have been entrusted to Congress.[80] Only the elected representatives of the people have the right to make such a decision. The need for a national debate on this issue should not have been underestimated in a country which supposedly considers ra-

75. 118 CONG. REC. 1385 (1972) (remarks of Sen. Saxbe).

76. OFCC Rev. Order No. 4, 41 C.F.R. § 60-2.12 (1978).

77. 343 U.S. 579 (1952).

78. Brief for Petitioner United Steelworkers at 82-83; Brief for Petitioner Kaiser Aluminum & Chem. Corp. at 34; Brief for Respondent at 80; Brief for Certiorari for Petitioner EEOC at 16.

79. 99 S. Ct. at 2734.

80. The defeat of the Dent and Ervin amendments in 1971 cannot be considered adequate approval of the kind of affirmative action program adopted by Kaiser. It is far easier for legislators to vote against an amendment that would outlaw racial balancing than to approve affirmatively an amendment to the Civil Rights Act specifically allowing such government-mandated race consciousness.

cial distinctions between citizens "odious to a free people . . . ."[81]

Charles W. Schlosser, Jr.

81. Hirabayashi v. United States, 320 U.S. 81, 100 (1943).